



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-05532
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: James T. Lombardi, Esq.

04/28/2016

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant did not file timely federal income tax returns for tax years 2009 and 2010 or state income tax returns for tax years 2010, 2011, or 2012. He has yet to file any returns for tax years 2013 or 2014. While Applicant paid the majority of his delinquent medical debts, he still owes about \$18,000 in past-due federal taxes. Clearance is denied.

Statement of the Case

On April 5, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, Financial Considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

On May 5, 2015, Applicant answered the SOR allegations, and he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On October 9, 2015, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for him. On October 27, 2015, I scheduled a hearing for November 19, 2015. Counsel for Applicant entered his appearance on November 9, 2015.

I convened the hearing as scheduled. The Government offered three exhibits (GEs 1-3), including as GE 3 a credit report dated November 16, 2015, which was provided to Applicant for the first time at the hearing. GEs 1 and 2 were admitted without any objections. I withheld ruling on GE 3 to give Applicant an opportunity to review the document after the hearing. The letter forwarding discovery of the Government's case to Applicant was incorporated in the record as a hearing exhibit (HE 1) but not admitted as evidence. Applicant submitted one exhibit (AE A), which was admitted without objection. He also testified, as reflected in a hearing transcript (Tr.) received on December 3, 2015.

I held the record after the hearing, initially until December 4, 2015, for Applicant to review and comment on proposed GE 3 and to submit additional documentary evidence. On December 4, 2015, Applicant indicated through counsel that he did not object to the admission of GE 3. He also moved to extend the deadline for further evidence to December 18, 2015. I granted the extension and admitted GE 3 into evidence. On December 18, 2015, Applicant submitted a letter from an enrolled agent retained by him to prepare his federal and state tax returns for 2013 and 2014. Department Counsel filed no objections by the January 8, 2016 deadline for comment, so the letter was admitted into evidence as AE B.

Summary of SOR Allegations

The SOR alleges under Guideline F that Applicant owed medical collection debt totaling \$1,004 (SOR ¶¶ 1.a-1.h)¹ and approximately \$18,000 in delinquent federal tax debt for tax years 2009, 2011, and 2012 (SOR ¶ 1.k) as of April 2015.² Additionally, Applicant is alleged to have failed to file timely federal income tax returns for tax years 2009 and 2010 (SOR ¶ 1.l) and state income tax returns for tax years 2010, 2011, and 2012 (SOR ¶ 1.m). When he answered the SOR in May 2015, Applicant denied the medical debts because he had no record of them. He explained that some medical bills had not been filed with his secondary insurer and had been placed for collection before he learned of the balance from his provider. He also denied the \$100 debt alleged in SOR ¶ 1.f because he had no record of it and did not recognize the creditor. Applicant admitted that he owed delinquent federal taxes as alleged and that he had not filed timely federal or state tax returns as alleged. Family health issues led him to fall behind on some debt payments and on his tax filings. He also indicated that after successfully modifying his home loan but also losing a retirement home to foreclosure, he was checking to ensure that he was in compliance with filing all required tax returns and looking to put a plan in place to pay his delinquent taxes.

¹ GE 2 reflects that the debt in SOR ¶ 1.f is a medical debt as well.

² The SOR contains no subparagraph 1.i or 1.j.

At his security clearance hearing, he admitted liability for all of the medical debts alleged in the SOR.

Findings of Fact

After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 61-year-old systems engineer, who has worked for a defense contractor since July 1997. (GE 1; Tr. 20-21.) Applicant graduated from a U.S. military service academy in June 1976. He earned his master's degree in September 1983 from a military postgraduate school, and after 18 years of decorated active-duty service (AE A), he retired early in July 1994. (GE 1; Tr. 23-24.) Applicant worked for a small defense contractor from 1994 to 1997. (Tr. 23.) He had a top-secret clearance for his last 10 years in the military, and it was transferred for his work with the small defense contractor and then for his current employment. In 2012, his clearance was administratively downgraded to secret because of a change in his position and responsibilities. (Tr. 22, 25.) He seeks to retain his secret clearance. (Tr. 24.)

Applicant and his spouse married in November 1976. They have two grown children, a son now 27 and a daughter now 24.

Applicant began having tax problems in 2009. He made an error on his and his spouse's joint return for 2008. From May 2012 to August 2012, the Internal Revenue Service (IRS) garnished his wages to collect \$7,500 in delinquent income tax debt for 2008 after he missed some installment payments. (Tr. 52-53.) The IRS released the levy in August 2012 on payment of the debt. (GE 1.)

Applicant did not file required federal income tax returns for tax years 2009 and 2010 when they due. (GE 1.) The IRS filed substitute returns for Applicant as married, filing separately. Based on his income and no deductions for mortgage interest or dependents, the IRS calculated his tax liability at \$60,000 for 2009 and \$66,000 for 2010. (Tr. 54-55.) Applicant filed his delinquent federal returns for 2009 and 2010 in 2012, after he received notice from the IRS that he owed about \$126,000. (Tr. 34, 54.) The IRS reduced his tax liability to approximately \$18,000 for tax years 2009 and 2010 based on his filing status, claimed dependents, and other deductions. (Tr. 34, 54-55.)

Applicant also did not timely file state income tax returns for tax years 2010, 2011, and 2012. (GE 1; Tr. 34.) Given he had not prepared his federal income tax return on time for 2009, it is likely that he did not file a timely state income tax return for tax year 2009 as well, although the evidence is unclear on that issue. Applicant was billed by the state approximately \$200 in delinquent taxes for 2010, which he claims he paid. (Tr. 35.)

In 2010 and 2011, Applicant's son had some mental health issues that may have involved misconduct with his sister. These family issues distracted Applicant from addressing some of his obligations, including his taxes. (Tr. 35-36.) Applicant reduced his

work hours from 40 to 20 per week starting in 2011 and intermittently took leave under the Federal Medical Leave Act over the next two years. (Tr. 39-40, 63.) In January 2012, Applicant and his spouse began weekly counseling with a therapist to cope with the family's issues. (Tr. 39.) The frequency of the counseling sessions gradually declined over the year to where it was intermittent in 2013. (Tr. 39-40.)

In June 2011, even with his military retirement pay, Applicant and his spouse began falling behind on an FHA mortgage obtained in November 1998 for \$124,555. The loan was for a property they intended as their retirement home. Their tenants had vacated the property early without paying their rent. Applicant and his spouse had a mortgage on their current residence and could not afford to pay a second mortgage on their retirement property. They had no success in obtaining a loan to cover the mortgage on their retirement property. (Tr. 38-39.) Available credit information shows that Applicant and his spouse had a history of late payments on the account before the lender foreclosed on the retirement property in August 2013. (GEs 2, 3.) At the time of the foreclosure, Applicant and his spouse owed \$125,320 on the mortgage loan. They had considerable equity in the home, and after the home sold at auction, Applicant and his spouse received approximately \$200,000. (GE 1; Tr. 57-58.)

Applicant self-reported the foreclosure to his employer, which he believes led to the DOD investigating his background. (Tr. 49, 51.) He did not think to report that he was delinquent on his federal and state tax filings. (Tr. 52.) At the request of the government, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on December 16, 2013. Applicant responded affirmatively to an inquiry concerning whether he had failed in the last seven years to file or pay federal, state, or other taxes when required by law or ordinance. He indicated that he and his spouse filed their 2009 and 2010 federal income tax returns late and owed an estimated \$8,000 for 2009 and \$10,000 for 2010. He explained that the IRS had assessed significantly higher tax liabilities for those tax years based on substitute returns and that he had disputed the assessments with the IRS. Applicant gave as the reason for the late federal filing that he lost the information needed to file the returns. Applicant also disclosed that he had not yet filed his state income tax returns for 2010, 2011, and 2012. He expressed his intent to file his delinquent state returns for all three years by December 30, 2013. Applicant expected to owe no state income taxes for those years. Applicant responded affirmatively to an inquiry into any delinquencies involving enforcement in the last seven years and listed the foreclosure of his intended retirement home. Since he and his spouse had made a profit on the foreclosure sale, he believed he owed nothing to the mortgage lender, but he might owe federal taxes on the capital gains. Applicant also answered "Yes" to questions concerning any delinquency involving routine accounts. He explained that he had overdrawn his checking account in 2011; that his wages had been levied by the IRS between May 2012 and August 2012 to recover a \$7,500 tax debt for tax year 2008; and that \$150 in medical debt had been placed for collection because a medical provider did not always bill his secondary insurer. (GE 1.)

A check of Applicant's credit on January 22, 2014, revealed that the mortgage loan on Applicant's and his spouse's residence had been in foreclosure as of April 2013. They

averted foreclosure through a loan modification. Since then, Applicant and his spouse had fallen behind 30 days on their \$1,180 monthly payment once, in October 2013, but payments were otherwise timely. They had a history of late payments on a June 2010 automobile loan that they were repaying at \$349 per month, including in November 2013, although the loan was current as of January 2014. Their mortgage on the retirement property had a zero balance after the foreclosure. Several medical debts totaling \$1,004 (SOR ¶¶ 1.a-1.h) were in collection. (GE 2.) Sometime in 2014, Applicant had a second crisis involving his son, which he testified left him unable to concentrate on his personal affairs. (Tr. 36.)

On April 5, 2015, the DOD CAF issued an SOR to Applicant because of his medical debts in collection, his outstanding federal tax liability, and his failure to file timely federal income tax returns for 2009 and 2010 and state income tax returns for 2010, 2011, and 2012. When Applicant answered the SOR in May 2015, he denied the medical collection debts because he had no record of them. Sometime after September 10, 2015, Applicant received a copy from Department Counsel of the January 22, 2014, credit report. Applicant inquired about the debts and was able to verify those debts in SOR ¶¶ 1.a-1.e and 1.g. Applicant paid those debts on November 18, 2015. (Tr. 27-29.) Applicant intends to inquire of his secondary insurer about the medical debts in SOR ¶¶ 1.f and 1.h. (Tr. 29-30.)

As of November 16, 2015, Applicant's credit record showed that a \$41 medical debt had been placed for collection in September 2015. Additionally, Applicant and his spouse had fallen behind on their mortgage loan in April 2015, July 2015, and August 2015. Their scheduled payment is currently \$1,196 per month. The June 2010 auto loan had been delinquent from February 2015 through July 2015, but he brought it current in August 2015. Repayment of student loans of \$33,225 and \$27,014 opened in September 2010 and September 2011 is deferred until December 2017. (GE 3.)

As of his security clearance hearing in November 2015, Applicant testified that he had filed his federal income tax returns for tax years 2009 through 2012, but had not yet filed his federal income tax returns for 2013 and 2014. (Tr. 54, 56.) He requested extensions, but allowed them to lapse without filing his returns. (Tr. 56.) Nor had Applicant filed his state income tax returns for tax years 2010 through 2014. (Tr. 35, 64-65.) Applicant has been unable to locate his copy of documents about the foreclosure sale which he needs to file their taxes for 2013. (Tr. 38, 53.) As for what has prevented him from filing timely federal and state income tax returns for tax year 2014, Applicant testified that he lost some of the wage forms. (Tr. 60.) He has yet to make inquiries of his employer for his earned income information or of the military for his retirement pay information. (Tr. 61.) After taxes, Applicant nets \$2,300 in military retirement pay each month. (Tr. 63.)

Applicant has made no payments toward his \$18,000 in federal taxes owed for 2009 and 2010 because he was told by an IRS agent that he cannot enter into an installment plan with the IRS until all his returns are filed. (Tr. 54.) He believes that he and his spouse will owe federal income taxes for both years. (Tr. 57-58.) He had taxes withheld from his wages. (Tr. 59.) Applicant believes that he and his spouse still have about \$85,000 of the \$200,000 received from the foreclosure sale, although he is not certain. (Tr. 62.) As to why

he did not pay off their \$18,000 federal tax debt for 2009 and 2010, Applicant responded, “I should have done that.” (Tr. 61-62.) Applicant understands that he should have addressed his tax issues sooner. (Tr. 41.) When asked to explain the delay, Applicant cited the distractions of his family issues and the foreclosure proceedings, and his failure to get organized sooner. (Tr. 35-36.)

Applicant met with a tax specialist on December 2, 2015, for assistance in completing his and his spouse’s joint federal and state income tax returns for tax years 2013 and 2014. On December 18, 2015, a tax agent confirmed that he had been retained and had met with Applicant to gather the documents needed to prepare the returns for those two tax years. The professional tax preparer expected to prepare Applicant’s 2014 income tax returns within the next few days. However, the tax returns for 2013 were more involved and could take additional time. (AE B.)

Applicant was given an inventor award from his employer in 2010. He received a 15-year service award in 2012. (AE B.) He has never had a security clearance suspended or revoked. (Tr. 50.) Applicant characterized as “favorable” his performance review for the year ending in December 2014. He denies ever committing any security violations (Tr. 43), and there is no evidence to the contrary.

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concerns for financial considerations are articulated in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant did not file timely federal returns for tax years 2009 and 2010 or state returns for tax years 2010 through 2012. He brought his federal returns up-to-date in 2012 after the IRS filed substitute returns assessing a total tax debt of \$126,000 for those two years. Based on their late returns, Applicant and his spouse were successful in reducing their tax liability to \$18,000, but they had made no payments toward their tax debt as of April 2015. Applicant owed an additional \$1,004 in medical collection debt. The evidence establishes three disqualifying conditions under AG ¶ 19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

As of December 18, 2015, Applicant and his spouse had yet to file their federal income tax returns for tax years 2013 and 2014 or their state income tax returns for tax

years 2010 through 2014. They had made no payments toward their \$18,000 federal tax debt, despite having possibly as much as \$85,000 in bank deposits remaining from the \$200,000 received after the foreclosure auction of their intended retirement home. Mitigating condition AG ¶ 20(a), “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” cannot reasonably apply.

Applicant’s difficult family circumstances involving his son partially implicate AG ¶ 20(b), which provides:

(b) the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.

Care for his son and family understandably took priority around 2011 and 2012. He lost income because he reduced his work hours to cope with family issues. Applicant also did not foresee that his renters would break their lease on the retirement property. His son had additional mental health issues in 2014. Yet AG ¶ 20(b) does not fully explain or mitigate his tax filing and tax payment problems. After the IRS assessed him some \$126,000 in income tax liability, Applicant managed to file his and his spouse’s delinquent joint federal returns for tax years 2009 and 2010. At his hearing, he attributed his noncompliance with their tax filing obligations for tax years 2013 and 2014 to his disorganization. Yet, within a month, Applicant was able to gather his paperwork for a professional tax preparer to file their 2014 income tax returns by the end of December 2015. The evidence also suggests an unacceptable disregard of the laws concerning tax payment when he has yet to make any payments toward his \$18,000 in delinquent federal taxes for 2009 and 2010, despite receiving approximately \$200,000 from the foreclosure sale of their retirement property.

On November 17, 2015, Applicant apparently paid the medical debts in SOR ¶¶ 1.a-1.e and SOR ¶ 1.g. Some security concerns arise from his delay in addressing the debts. Applicant has an obligation to ensure that medical providers bill his secondary insurer, or if billed, to ensure that he pays any non-covered expenses. He indicated on his SF 86 that a medical provider had a history of not billing his secondary insurer, so he was aware of a potential problem. Yet, he is credited with researching the debts in collection on his credit record after he received a copy of his January 2014 credit report from Department Counsel in September 2015. AG ¶ 20(c), “the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control,” and AG ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” apply to the medical collection debts that have been paid. The remaining collection debts total only \$120. While they are yet to be resolved, they raise little current security concern on their own. AG ¶ 20(c) and AG ¶ 20(d) apply to Applicant’s tax issues only with respect to his belated filing of his federal returns for tax years 2009 and 2010. He has yet to demonstrate that he can be counted on to timely file

his federal and state income tax returns on time, or to pay taxes owed when they are due. Applicant testified that he cannot enter into an installment plan with the IRS to address his \$18,000 federal tax liability until all his delinquent tax returns are filed. He also admitted that he has about \$85,000 of the \$200,000 received from the foreclosure sale. When asked why he has not paid off his tax debt in a lump sum, Applicant responded, "I should have done that." The financial considerations concerns are not fully mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).³

A determination of any applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern. Applicant's record of decorated military service certainly weighs in his favor under the whole-person evaluation. There is no evidence that he has ever violated security regulations while in the military or as a defense-contractor employee. Yet, it is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). Applicant failed to display the sound judgment, reliability, and trustworthiness expected of him as a longtime clearance holder and retired military officer when he did not file timely federal or state income tax returns for several tax years. A review of his recent credit report shows a troubling pattern of late payments on his mortgage and car loan in 2015. It is unclear why he has been unable to make all his payments on time. Assuming that he files his delinquent federal income tax returns and enters into an installment plan to repay his and his spouse's \$18,000 in delinquent federal income taxes, there is no guarantee that he will make timely payments. His failure to comply with a previous installment plan for his 2008 taxes led the IRS to levy on his wages in 2012. For the reasons stated above, I am unable to conclude that it is clearly consistent with the national interest to continue Applicant's security clearance eligibility.

³ The factors under AG ¶ 2(a) are as follows:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress;
- and (9) the likelihood of continuation or recurrence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.k: ⁴	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

⁴As previously noted, the SOR contains no subparagraphs 1.i or 1.j.